Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1826

JOHN RESETAR, JR.,

Petitioner,

v.

THE STATE BOARD OF EDUCATION OF MARYLAND

and

BOARD OF EDUCATION OF MONTGOMERY COUNTY, MARYLAND,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

The Respondent, Board of Education of Montgomery County, Maryland, respectfully prays that the Petition for Writ of Certiorari herein requested be denied.

OPINIONS BELOW

Petitioner correctly adverts to the opinions (majority and dissenting) of the Court of Appeals of Maryland reported at

284 Md. 537, found in Petitioner's App. A 1a and App. B, 29a.

However, as will be shown hereinafter, Petitioner has failed to include in his appendix the following crucial opinions of the State lower court and administrative agencies, contrary to Rule 23-1(i) of this Court:

(1) Opinion of the Circuit Court for Montgomery County, Maryland, dated February 22, 1978.

(2) Opinion of the Maryland State Board of Education, dated November 24, 1975.

(3) Opinion and Recommendations of Maryland State Board of Education Hearing Examiner, dated September 24, 1975.

(4) Decision and Order of the Board of Education of Montgomery County, Maryland, dated April 14, 1975.

(5) Decision and Report of the Board of Education of Montgomery County, Maryland Hearing Examiner.

JURISDICTION

This is an alleged controversy involving Petitioner's claim of rights arising under the First, Fifth and Fourteenth Amendments to the Constitution. Petitioner invokes the jurisdiction of this Court under Title 28 USC, Section 1257(3). For reasons to be stated hereinafter, this Respondent does not concede jurisdiction in this Court on these issues.

QUESTIONS PRESENTED

(Respondent, Board of Education of Montgomery County, Maryland does not agree to or accept Petitioner's Statement of Questions Presented and has reframed the Questions Presented).

I. Whether Petition has shown that he has raised any substantial Federal question justifying jurisdiction in this Court?

II. Whether Petitioner has appended to his Petition for Certiorari the requisite opinions of the State lower court and several administrative agencies whose decisions are so crucially involved herein?

III. Whether, if jurisdiction lies in this Court, Petitioner's due process rights under the Fifth and Fourteenth Amendments to the Constitution of the United States were violated by his dismissal?

IV. Whether, if jurisdiction lies in this Court, Petitioner's due process rights under the Fifth and Fourteenth Amendments to the Constitution of the United States were violated when this Respondent failed to decide Petitioner's cause within the 30 days period required by its own rules, but rather fourteen days later?

V. Whether, if jurisdiction lies in this Court, the First Amendment to the Constitution of the United States protected Petitioner's derogatory and arguably racially motivated utterances, while on duty as Respondent's employee, made to a group of black students, after having been previously and repeatedly warned and admonished regarding his intemperate outbursts?

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS AND RULES INVOLVED

The Petition for Certiorari to which this response is made sets forth certain necessary and appropriate constitutional

and statutory provisions and rules involved, excepting Rule 23 of this Court, reprinted hereinbelow:

Rule 23. The Petition for Certiorari

1. The petition for writ of certiorari shall contain in the order here indicated—

(a) A reference to the official and unofficial reports of the opinions delivered in the courts below, if any, and if reported. Any such opinions shall be appended as provided in subparagraph (i) hereof.

(b) A concise statmeent of the grounds on which the jurisdiction of this court is invoked, showing:

(i) The date of the judgment or decree sought to be reviewed, and the time of its entry;

(ii) The date of any order respecting a rehearing, and the date and terms of any order granting an extension of time within which to petition for certiorari; and

(iii) The statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question by writ of certiorari.

(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court.

(d) The constitutional provisions, treaties, statutes, ordinances, or regulations which the case involves, setting them out verbatim, and citing the volume and page where they may be found in the official edition. If the provisions involved are lengthy, their citation alone will suffice at this point, and their pertinent text shall be set forth in an appendix.

(e) A concise statement of the case containing the facts material to consideration of the questions presented.

(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the

proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

Where the portions of the record relied upon under this subparagraph are voluminous, then they shall be included in an appendix to the petition, which may, if more convenient, be separately presented.

(g) If review of the judgment of a federal court is sought, the statement of the case shall also show the basis for federal jurisdiction in the court of first instance.

(h) A direct and concise argument amplifying the reasons relied on for the allowance of the writ. See Rule 19.

(i) There shall be appended to the petition a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, including all opinions of courts or administrative agencies in the case, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, opinions in companion cases. The opinions shall include the caption showing the name of the court or agency issuing the same and the title and numbers of the case and the date of their entry. If whatever is required by this paragraph to be appended to the petition is voluminous, it may, if more convenient, be separately presented.

(j) If review of the judgment or decree of a state court is sought, there shall also be appended to the petition a copy

of the judgment or decree in question and any order on rehearing, and, if review of the judgment or decree of a federal court is sought, there shall similarly be appended a copy of such judgment or decree and any order on rehearing, which may however be limited to the portions thereof sought to be reviewed. The judgments, decrees, or orders on rehearing shall include the caption showing the name of the court issuing the same, the title and number of the case, and the date of entry of such judgment, decree and order.

2. The petition for writ of certiorari shall be printed in conformity with Rule 39.

3. All contentions in support of a petition for writ of certiorari shall be set forth in the body of the petition, as provided, in subparagraph (h) of paragraph 1 of this rule. No separate brief in support of a petition for writ of certiorari will be received, and the clerk will refuse to file any petition for writ of certiorari to which is annexed or appended any supporting brief.

4. The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

5. Where several cases are sought to be reviewed on certiorari to the same court that involve identical or closely related questions, it shall suffice to file a single petition for writ of certiorari covering all the cases.

STATEMENT OF THE CASE

This Petition for Certiorari arises out of a dismissal by this Respondent of Petitioner from employment for misconduct in office, because of certain derogatory and arguably racial

remarks made to a group of black students at the close of schol on June 18, 1974. The Superintendent of Schools recommended Petitioner's dismissal; Petitioner prayed a hearing and Respondent caused the matter to be heard by its Hearing Examiner, John Whitney, Esquire. The Hearing Examiner took full testimony, recommended dismissal and after oral argument on the recommendations, upheld the dismissal. Respondent's decision came 14 days after the time fixed by its rules for rendering such judgments and in its order; it determined that Petitioner be "restored to pay" for the 14 day period, because of the delay.

Petitioner appealed to the Maryland State Board of Education, which referred the matter to Herbert Fierst, Esquire, its Hearing Examiner, who took full *de nouo* testimony, including receiving the local board's transcript in evidence, wrote a full opinion and upheld Mr. Whitney's recommendations. The Maryland State Board of Education adopted Mr. Fierst's recommendations for upholding Petitioner's dismissal.

Appeal was then taken by Petitioner to the Circuit Court for Montgomery County, Maryland, under the State Administrative Procedure Act, Judge Fairbanks presiding. After full argument on the record, the trial court upheld the decision of the Maryland State Board of Education, affirming Petitioner's dismissal.

Petitioner then appealed to the Court of Special Appeals of Maryland, to which the Court of Appeals of Maryland directed, *sua sponte,* its Writ of Certiorari.

No federal questions were raised in these proceedings, either administratively, in the trial court or in the Court of Appeals of Maryland, nor were any either discussed or decided. The first complaints in these proceedings on federal constitutional grounds are found in Petitioner's Petition for

Writ of Certiorari.

The Board of Education of Montgomery County, the Maryland State Board of Education and its Hearing Examiner, the Circuit Court for Montgomery County, Maryland and the Court of Appeals of Maryland independently reviewed the record and affirmed.

The salient facts are:

On September 16, 1974, Dr. Homer O. Elseroad, Superintendent of Schools for Montgomery County, Maryland, wrote to Appellant John Resesar, Jr., advising him that he intended to recommend his dismissal from service in the Montgomery County Public Schools upon the grounds of misconduct in office and insubordination. This recommendation was based upon the allegation that Mr. Resetar made a remark "to a group of students at Gaithersburg Junior High School which might be interpreted as being intemperate under the circumstances and might be interpreted as having a racial connotation".

The remark alleged as made openly to a group of black students was "Look at those jungle bunnies. Somebody ought to feed them bananas", or "Come on over here and I will feed you some bananas". These remarks were testified to as having been made twice by an open window and that they were heard by the students.

Dr. Elseroad's letter of September 16, 1974 adverted to Mr. Resetar's violation of the School System Policy Statement on Human Relations and to prior formal and informal warnings to him while a staff member on prior occasions at Broome Junior High School, Newport Junior High School and Gaithersburg Junior High Schools "about making remarks to students and/or fellow staff members which were not only intemperate and overreactive but which also, in some instances, had derogatory racial or ethnic overtones."

Three fellow employee witnesses, Lucille Goldsmith, Virginia McCauley and Dr. Tootle, Assistant Principal heard the "jungle bunny" remark made by Mr. Resetar, out an open window, to a group of black students. Mr. Resetar testified that the window was closed when he made the remark and that it was "humanly impossible" for anyone outside the window to hear him. Testimony by Mr. Tootle confirmed that some of the students did hear the remark and several asked him if he was going to do anything about it.

Mr. Tootle testified that "jungle bunny" is a term derogatory to a black student and not appropriate for a teacher at Gaithersburg Junior High School, in response to a thirteen year old's comments. Dr. Busbice, the principal at Gaithersburg Junior High School, perceived Mr. Resetar's specific comment concerning "jungle bunny" as inappropriate for a teacher on his staff, in that it was inflamatory, racist and discriminatory.

Superintendent Elseroad testified that he "was pursuaded that Mr. Resetar's behavior in relation to students in different situations, different teaching situations he has been in over this period of time were reviewed from '72 until now, there are or have been incidents which conclusively . . . and inescapably show that Mr. Resetar does not demonstrate respect for s tudents; that there are racist and discriminatory manifestations in his behavior and that this is in violation of policy and . . . the same kind of conduct is not acceptable conduct on the part of a teacher irrespective of these policies and therefore is judged by me to be misconduct in office".

Throughout the proceedings, before the local board Hearing Examiner, Mr. Whitney, the Board of Education of Montgomery, the State Board Hearing Examiner and the State Board of Education, Appellant's pattern of intemperate conduct, as defined by Mr. Whitney in his initial

opinion, was upheld as sufficient finding to support the charge of misconduct in office. These findings were affirmed by Judge Fairbanks, in the Circuit Court for Montgomery County, Maryland, who found, inter alia, that Appellant "could not conform or control his conduct even after warnings from his superiors".

REASONS FOR DENYING THE WRIT

I. Petitioner has failed to raise any substantial federal question justifying jurisdiction in this Court.

Rule 23-1(f) requires, inter alia:

"If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which the federal questions sought to be reviewed were raised; the method of raising them . . . and the way in which they were passed upon by the court, such pertinent quotations of specific portions of the record or summary thereof, with specific references to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on Writ of Certiorari."

The federal question must be raised at the proper point in the state court proceeding. *Godchaux Co. Estopinal,* 251 U.S. 179, 181. Where the state court fails to rule upon a federal question expressly, Petitioner has the burden to show that he properly raised it. *Hulbert v. Chicago,* 202 U.S. 275.

Raising a federal question for the first time in this Court comes too late. *White River Lumber Co. v. Arkansas ex rel. Appelgate,* 279 U.S. 692. Even a brief filed before a state court cannot be used to establish the raising of a federal question in that court. See: *Lynch v. New York ex rel. Pierson,* 293 U.S. 52, 54. Once the case is in the Supreme Court, review is limited to the specific federal questions that were properly raised in the state court. *Whitney v. California,* 274 U.S. 357, 362-3, even though they might have been raised. *Cardinale v. Louisiana,* 394 U.S. 437, 438.

Here, Petitioner's statement of the case neither conforms to Rule 23, nor can it. He cannot show any substantial federal questions as raised in the state court or administrative system, where and how they were raised, or the manner in which they were ruled upon by the state court(s). The due process and free speech questions he seeks to have reviewed here under the First, Fifth and Fourteenth Amendments to the Constitution of the United States were never once raised or discussed in the state court system. Rather Petitioner's dismissal was reviewed on non-federal grounds and its judgment based thereon adequate. See: *Wilson v. Loew's, Inc.* 355 U.S. 597. On this basis alone, jurisdiction in this Court should not be accepted.

II. The Petitioner has failed to append to the Petition the Opinions of the State lower court and state administrative agencies involved in violation of Rule 23-1(f) of this Court.

Rule 23-1(i) of this Court requires that there be appended to the Petition ". . . all opinions of courts or administrative agencies in the case. . ." As indicated in opinions below, *infra,* P. 1, there are five opinions not included from the

state system, one from the trial court and four from the administrative agencies. Petitioner urges that this Court follow the rule of *Pickering v. Board of Education*, 391 U.S. 563 to "review in full the actions of administrative boards and lower courts", (Petition, P. 10, 15, 16, 20), when actually only a selective view may be had of what took place in the administrative agencies and lower court before the Court of Appeals of Maryland rendered its opinion (App. A, 1a).

The Rule requires that this Court have available to it sufficient of what took place in the state system; it has now only the opinion of the Court of Appeals of Maryland. If there is more, as here, it must be added to the appendix in order to accomplish an immediate overview of the state proceedings. In the present state of the printed record, this cannot be done and for such reason, this Court should decline jurisdiction.

III. Petitioner was not denied due process by his dismissal; his cause was properly decided on non-federal grounds.

Inasmuch as no federal ground is shown by Petitioner to have been raised by him in the state courts and none decided by the Court of Appeals of Maryland, review may be had to determine whether such non-federal ground was adequate to support its judgment, if said ground is, in fact, non-federal. See: *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 455; *Murdock v. Memphis*, 20 Wall 590, 636.

The Court of Appeals of Maryland determined there was sufficient evidence to warrant Petitioner's dismissal. In doing so, the Court applied the rule of review set forth by *Article 41, Section 255 of the Annotated Code of Maryland*,

citing *Oxon Hill Rec. Club v. Water Res. Admin.*, 281 Md. 110, 375 A.2d. 567, namely:

> "(O)ur review of actions taken or determinations made by an administrative agency . . . is narrowly limited. Our inquiry is almost always limited to whether there was illegality, arbitrariness or unreasonableness in the action that was taken. . . . Even challenges directed at the substantiality of the evidence must be tested by standards of arbitrariness and capriciousness. . . . (Id at 113)"

Further, the Court of Appeals has repeatedly stated that the court "should not substitute its judgment for the expertise of the administrative agency from which an appeal is taken", citing *Grosvenor v. Real Estate Commission*, 267 Md. 259, 297 A.2d. 257. This is especially true in matters involving public education. *Zitschel v. Board of Education*, 274 Md. 69, 82, 332 A.2d. 906.

The Court of Appeals fairly debated and divided, 4 to 2, on the question of whether there was substantial evidence to support the finding of dismissal of Petitioner, viewing the record as a whole. In so doing, the Court reached no federal issues and its judgment was altogether consistent with its prior declarations in cases arising under the Maryland Administrative Procedure Act, *Article 41, Section 255*, supra; *Wilson v. Board of Education*, 234 Md. 561, 565, 200 A.2d. 67; *Wiley v. School Commissioners*, 51 Md. 401, 406. The statute *(Article 77, Section 6 of the Annotated Code of Maryland*, now recodified as *Section 2-201, et seq., Education Article, Annotated Code of Maryland)* has clearly invested "the State board with the last word on any matter concerning educational policy or the administration of the system of public education". *Wilson v. Board of Education*, supra, at 234 Md. 565. The Court of Appeals comprehensively reviewed American cases on the question

of sufficiency of bases for dismissal on grounds of misconduct and determined that the judgment of the administrative agencies had been adequately supported and not arbitrarily done. The Court specifically found Petitioner had not merely uttered the racial epithet to himself, that his was not a single act of misconduct and that there had been prior admonitions to him. Whereupon, the Court of Appeals determined not to substitute "our judgment for that of the agency". 284 Md. 537, at 563.

IV. Petitioner was not denied his due process rights under the Fifth and Fourteenth Amendments to the Constitution of the United States by this Respondent's failure to decide his cause within the 30 days required by its Rules of Procedure, but rather 14 days later.

The argument may again be made that this issue was never raised in the state courts as a federal question and was decided solely on non-federal grounds. A review of the Court of Appeals rationale will confirm that such ground was adequate to support its judgment on this point. *N.A.A.C.P. v. Alabama,* supra, 357 U.S. 449, at 455.

The Maryland Court of Appeals resolved this point on the basis that the word "shall" was directory, rather than mandatory and that the County Board's regulation provided no penalty and made no provision in the event of a violation of the limit imposed. Further, the Court observed that Petitioner had suffered no prejudice. The two dissenting judges had no difficulty with this analysis. See: *Hutchins v. City of Cumberland,* 215 Md. 315, 323, 138 A.2d. 359; *Upshur v. Baltimore City,* 94 Md. 743, 51 A. 953; *McCall's Ferry Co. v. Price,* 108 Md. 96, 69 A. 832.

V. Petitioner's due process rights under the First Amendment to the Constitution of the United States were not violated by Respondent's dismissal of him for derogatory and arguably racially motivated utterances, while on duty as Respondent's employee, made to a group of black students, after having been previously and repeatedly warned and admonished regarding his intemperate outbursts. No constitutional free speech questions are involved.

The "free speech" point was never raised in the state administrative or judicial system, nor has Petitioner shown in his statement of the case that he did raise it or the stage thereof. *Hulbert v. Chicago,* supra; *White River Lumber Co. v. Arkansas, ex rel. Applegate,* supra. This misconduct of Petitioner, insofar as his speech on June 18, 1974 is concerned, was decided adequately on non-federal grounds. See: *N.A.A.C.P. v. Alabama,* supra.

The Maryland Court of Appeals reviewed in detail Petitioner's conduct on the day in question, against the backdrop of repeated warnings and admonitions over prior years, regarding his intemperate outbursts. The Court applied the rule of *Insurance Commissioner v. National Bureau,* 248 Md. 292, 236 A.2d. 282, that in "reviewing the action of an administrative agency we must not engage in judicial fact finding or substitute our judgment for that of the agency." The Court of Appeals below found no arbitrary conduct on the part of the Respondent, State Board of Education. The Court fairly applied the rule of review from a Maryland administrative agency, one which is invested "with the last word on any matter concerning educational policy or the administration of the system of public education", *Wilson v. Board of Education,* supra, 234 Md. at 565.

This Petitioner directed his derogatory remarks out an open window, to a group of black students, who heard his offensive comments. This may have been the final straw, after repeated warnings in other schools and at this school, against this type of conduct. As Justice Holmes stated in *Schenck v. United States*, 249 U.S. 47; "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic".

Petitioner is not entitled to the protection of the First Amendment in what he said, on the job and under these circumstances. The cases he cites are not apropos to the instant case. In the words of the trial Court: "... he could not conform or control his conduct even after warnings from his superiors." It was not free speech to goad and provoke an essentially captive student audience. His conduct here cannot be elevated to the level of a constitutionally protected First Amendment right.

CONCLUSION

For the reasons stated herein, this Respondent respectfully prays that Petitioner's Petition for a Writ of Certiorari be denied and that his claims of property right, free speech and due process be denied, in that these claims have been adequately and properly decided in the Court of Appeals of Maryland and have not been raised as Federal Questions until the filing of the instant Petition.

Respectfully Submitted,

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